B.P. PAKS SDN. BHD.

v.

SHENG HUNG INDUSTRIAL CO. SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[COMPANIES WINDING-UP NO. 42-74 OF 1986]
20 MAY 1992

COMPANY LAW: *Winding-up - Setting aside part of order - Jurisdiction of Court to order applicants (receivers) to pay costs of winding-up.*

CIVIL PROCEDURE: *Slip rule - Principles of - Absence of party at trial - Setting aside order obtained at trial.*

This is an application to set aside certain parts of a winding-up order dated 2 September 1987.

The applicants contended that a particular part of the winding-up order is bad in law as the Court has no jurisdiction to order the applicants to personally bear the petitioner's taxed costs in a winding-up proceeding where the applicants are complete strangers to the said proceedings.

Further, the applicants' Counsel argued that when the winding-up order was made the applicants were not present nor was their Counsel, and even if they or their Counsel had been present they would have had no *locus standi* to protest against such order being made against them.

Held:

[1] In an application such as this, the most vital issue is whether the facts and circumstances of this case fulfill the conditions as laid down by law to allow the setting aside of part of an order of Court when it is already properly drawn up perfected and extracted.

[2] Upon the facts, there is no clerical mistake or any error arising from any accidental slip or omission to warrant the exercise of O. 20 r. 11 of the RHC 1980. In fact, the order expresses the very intention of the Court in very clear and certain terms.

[3] If an order is properly drawn up and perfected the slip-rule cannot be used even to correct a mistake of law apparent on face of it. The Court has no jurisdiction to set it aside. To correct such mistake if any, other means must be used such as filing a fresh suit or by way of an appeal.

[4] In the first instance, the applicants were made a party to the petition by their very act of filing a notice of intention to appear. In addition, their Counsel attended various hearings when the petition was heard but the applicants or their Counsel chose to be absent despite the fact that they or their Counsel knew of the hearing date when the winding-up order together with payment of the costs were heard. Thus, these facts and circumstances do not provide any reasonable justification acceptable to the Court in granting a setting aside under O. 32 r. 11 of the RHC 1980.

[5] The applicants cannot qualify under O. 32 r. 2 RHC 1980 to set aside part of the order as no application was made for setting aside within 7 days after trial as provided for under O. 32 r. 2(2) of the RHC 1990.

[Application dismissed with cost.]

Cases referred to:
Kerupaya v. Ramasamy Chetty & Anor. 15 SSLR 3 ***(cit)***
Hock Hua Bank Bhd. v. Shari b. Murid [1981] 1 MLJ 143 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 32 r. 2, (2), O. 32 r. 11, O. 35 r. 2

For the petitioner - Ong Ban Chai; M/s Ong Ban Chai & Co.
For the respondent - Josephine Yee; M/s Skrine & Co.

JUDGMENT

James Foong J:

This is an application (encl. 63) by Abu Hassan Kendut, Ash'ari Ayub, Tay Chong Chim and Gong Wee Ning (hereinafter jointly referred to as the applicants), to set aside certain parts of a winding-up order dated 2 September 1987.

The facts of the case are briefly as follows. On 28 July 1986 a petition was presented by the petitioners in this case to wind up a private limited company by the name of Sheng Hung Industrial Co. Sdn. Bhd. (hereinafter referred to as Sheng Hung).

The petition was duly advertised and before the first hearing of the petition, which was fixed on 22 October 1986, M/s. Coopers & Lybrand who announced themselves as "receivers appointed by United Malayan Banking Corpn. Bhd. (UMBC)" of Sheng Hung, gave notice of intention to appear on the hearing of this petition.

In an affidavit subsequently filed by the applicants' solicitor Mr. Balarajah, the applicants declared themselves as partners of M/s. Coopers & Lybrand and were the receivers appointed for Sheng Hung and opposed the winding-up petition.

The petition was heard on 11 March 1987 where the applicants were represented by Counsel. At the request of the parties involved the hearing of this application was adjourned to 20 May 1987. Again on 20 May 1987 the hearing was further adjourned to 2 September 1987 at the request of the parties.

On 2 September 1987 the applicants apparently withdrew their objections and a winding-up order was made against Sheng Hung. Besides the usual winding-up order and the appointment of liquidators, M/s. Coopers & Lybrand was ordered to "pay to the petitioner the costs of and incidental to the winding-up and such costs which is to be taxed by the proper officer of the Court". This order was duly drawn up, perfected and extracted from the Court.

On 3 May 1989 in pursuance to an application (encl. 49) by the petitioner, the winding-up order dated 2 September 1987 was amended relating to the part where the costs of the petition was to be paid by M/s. Coopers & Lybrand. The part of the winding-up order now reads as follows:

> that Abu Hassan Kendut, Ashari Ayub, Tay Chong Chim and Gong Wee Ning of M/s. Coopers & Lybrand as the receivers and managers of the respondent appointed by the debenture holder UMBC on 11 August 1986 shall pay to the petitioner the costs of and incidental to the winding up and such costs which is to be taxed by the proper officer of the Court.

The applicants now seek to set aside with costs this particular part of the winding-up order. Their ground is that it is bad in law as the Court has no jurisdiction to order the applicants to personally bear the petitioner's taxed costs in a winding-up proceeding where the applicants

are complete strangers to the said proceedings. Further, the applicants' Counsel argued that when the winding-up order was made the applicants were not present nor was their Counsel and, even though if they and/or their Counsel were present they have no *locus standi* to protest against such order being made against them.

In an application such as this, the most vital issue is whether the facts and circumstances of this case fulfils the conditions as laid down by law to allow the setting aside of part of an order of Court when it is already properly drawn up, perfected and extracted.

Order 20 r. 11 of the High Court Rules allows judgment to be corrected due to clerical mistake or error arising from accidental slip or omission. However, if an order which is properly drawn up that clearly expresses the intention of the Court, this slip rule cannot be used even though it contains a mistake of law apparent on the face of it. See *Kerupaya v. Ramasamy Chetty & Anor.* 15 SSLR 3 and *Hock Hua Bank Bhd. v. Shari b. Murid* [1981] 1 MLJ 143.

In this case before me, I find absolutely no clerical mistake or any error arising from any accidental slip or omission. In fact the order expresses the very intention of the Court in very clear and certain terms. As stated in the authorities cited above, the order may contain a mistake in law but, this Court has no jurisdiction to set it aside. To correct such mistake if any, other means must be used such as filing a fresh suit or by way of an appeal.

Order 35 r. 2 of the High Court Rules may also allow any judgment or order obtained to be set aside at the discretion of the Court where, one party did not appear at the trial. This may be the rule the applicants' Counsel was relying on when she argued about the absence of the applicants when the winding-up order was made. However, after careful perusal of the Court documents and the affidavits filed in respect of this case, I find that the applicants' argument on this point is without merits. In the first instance, the applicants were made a party to the petition by their very act of filing a notice of intention to appear. Their Counsel Mr. Balarajah attended various hearings when the petition was heard. However, on 2 September 1987 when the winding-up order together with payment of costs was heard, the applicants or their Counsel chose to be absent despite the fact that they or their Counsel knew of the hearing date. These facts and circumstances do not provide any reasonable justification acceptable to this Court in granting a setting aside under O. 32 r. 11.

To further submit that even the applicants or their Counsel may be at the hearing of the winding-up, they have no *locus standi* is totally unaccepted. The applicants were made a party the moment they filed their notice of intention to be heard. At various stages of the hearing, from the affidavits of the applicants' solicitor, it was the applicants who opposed to the winding-up of Shen Hung. For such reason various postponements were granted. To allege that they have no *locus standi* when at every stage of the proceedings their objections and views were heard and accommodated is completely out of line.

Further, I find that the applicants cannot qualify under O. 32 r. 2 to set aside part of the order for reason that no application was made for setting aside within 7 days after trial as provided for under O. 32 r. 2(2).

For reasons I have stated aforesaid I dismiss the applicants' application with costs.

Also found at [1992] 3 CLJ 1573